

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES,)	
)	2:05-cr-0190-GEB
Plaintiff,)	
)	<u>ORDER</u>
v.)	
)	
MATTHEW McCALL,)	
)	
Defendant.)	
_____)	

Defendant Matthew McCall ("McCall") moves to suppress a loaded pistol that California State University ("CSU") Officer Solomon found during a frisk of McCall following a vehicle stop for an investigation of suspected attempted burglary and possession of marijuana. McCall states in his supplemental brief filed March 31, 2006, that he "does not question Officer Solomon's authority to stop the car" in which McCall was a front seat passenger, since Officer Solomon smelled the odor of marijuana emitting from the vehicle. (Def.'s Supp. Brief at 1.) However, McCall does challenge Officer Solomon's authority "to frisk [him]" following the stop.¹ (Id.)

¹ McCall's counsel informed chambers about the pendency of this motion and the failure of the government to submit a supplemental brief. The government indicated at the evidentiary hearing held February 17, (continued...)

Background

Officer Solomon was told by CSU Community Services Officer Woods that at approximately 2:00 a.m. on April 7, 2005, Woods had observed a vehicle occupied by at least two black males driving slowly in a dormitory parking area where a number of car burglaries had occurred, and that "it may be casing for car burglaries." (RT at 19.) Officer Solomon responded in a marked car and saw a vehicle occupied by four black adults exiting the dorm parking area. (RT at 25.) Officer Solomon positioned his marked car behind that vehicle. In that position, Officer Solomon could smell a strong odor of marijuana emitting from the vehicle. Subsequently, Officer Solomon made a vehicle stop on an esplanade, "which is on the exit or entrance to the University" and had "zero lighting." (RT at 6, 8.)

The vehicle did not "immediately pull over" after Officer Solomon activated his vehicle lights. (RT at 7.) Further, as Officer Solomon was following the vehicle he saw McCall do "what [he] thought to be a movement" in the vehicle; it "[l]ooked like [McCall] was either turning around in his seat or placing something underneath the seat" (Id.) Officer Solomon explained this movement concerned him because "they're trying to either ditch a weapon or maneuver into a position where they can use it against officers." (Id.)

After the vehicle stopped, Officer Solomon approached the passenger side so that his back would not be near traffic. (RT at 9.)

¹(...continued)
2006, that no further briefing was necessary because the Court had all the information it needed to resolve the motion.

1 He continued to smell marijuana wafting out of the vehicle as he
2 approached it. (Id.)

3 From the passenger side of the vehicle where McCall was
4 seated, Officer Solomon spoke with the driver regarding whether the
5 driver had a driver's license. The driver responded he did not have a
6 driver's license. (RT at 9-10.) Officer Solomon "could smell
7 marijuana . . . coming from the vehicle" the entire time he spoke to
8 the driver. (RT at 10.) Officer Solomon asked the driver to step out
9 of the vehicle and move to the back of the officer's vehicle. (Id.)
10 When Officer Solomon met the driver at that location, the driver
11 acknowledged he and the occupants of the vehicle had been smoking
12 marijuana. (Id.) The driver also told Officer Solomon "there was a
13 small amount of marijuana in the vehicle." (Id.) The driver was
14 placed in the back of Officer Solomon's patrol car after a pat-down
15 search, since he was detained for "investigation for narcotics and for
16 furtherance of [a] burglary investigation."² (Id.)

17 Officer Solomon testified "obviously, [he was] not going to
18 take [the driver's] word for [what was in the vehicle,]" and he
19 proceeded with his investigation. (Id.) Officer Solomon again
20 approached the passenger side of the vehicle and asked McCall to step
21 out of the vehicle. He thinks he asked McCall "the routine questions;
22 do you have anything on you, any weapons, . . . narcotics." (RT at
23 11.) Officer Solomon then performed "a cursory pat-down search [of
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25 ² The issue of whether sufficient reason existed for a burglary
26 investigation is not reached, since the circumstances involved with the
27 narcotics investigation (lateness of hour, smell of marijuana, admission
28 that marijuana had been smoked in the car and could be found in the car,
and that the driver was driving without a license) provided sufficient
justification for that investigation. See United States v. Little, 945
F. Supp. 79, 83 (S.D.N.Y. 1996) (where similar circumstances were found
sufficient to justify a Terry investigation).

1 McCall], for [his] safety," during which he found a loaded pistol in
2 McCall's back pocket. (RT at 11, 13.)

3 Analysis

4 "The standard for justifying a frisk is whether a reasonably
5 prudent person in the circumstances would be warranted in the belief
6 that his . . . safety or that of others was in danger." United States
7 v. Thomas, 863 F.2d 622, 628 (9th Cir. 1988). Since Officer Solomon
8 observed McCall make a furtive type of movement indicating McCall
9 could have "either ditch[ed] a weapon" or maneuvered a weapon "into
10 position where [it could be] use[d] against officers," Officer
11 Solomon's protective frisk of McCall was justified. (RT at 7.)

12 A furtive movement in face of being followed by a patrol car
13 is a pertinent factor in determining the reasonableness of a
14 protective frisk. Thomas, 863 F.2d at 629 (identifying "abrupt
15 movements [and] . . . suspicious, furtive behavior" as factors in
16 determining whether a frisk is justified). Officer Solomon knew
17 narcotic criminal activity was occurring in the vehicle in which
18 McCall was a passenger, and that the driver implicated McCall in that
19 activity, and that to conduct that investigation inside the vehicle
20 safely, McCall would have to be removed from the vehicle. Since
21 McCall was seen engaged in a furtive movement consistent with
22 concealing a weapon on his person, that observation "justifiably
23 prompted [Officer Solomon] to fear for his safety" and to frisk McCall
24 to see if he was armed. Id.; see also Little, 945 F. Supp. at 83
25 (where the court observed that vehicle occupants who "appear[ed]
26 nervous[,] . . . together with . . . lateness of hour, smell of
27 marijuana, admission that a 'blunt' had been smoked in the car, [and
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1 the driver was] driving without a license . . . [was] sufficient to
2 justify a frisk based solely on reasonable suspicion.").

3 An issue not addressed by the government and not argued by
4 McCall is whether the frisk could be justified under Terry if McCall
5 had been handcuffed before he was frisked. Although the government's
6 examination of Officer Solomon at the suppression hearing established
7 that the frisk occurred before McCall was handcuffed, defense
8 counsel's examination of Officer Solomon elicits contradictory
9 testimony which indicates the frisk could have occurred after McCall
10 was handcuffed. This timing issue is immaterial here, because even if
11 McCall had been frisked after he had already been handcuffed, the
12 frisk was not unreasonable under the circumstances. As the Fifth
13 Circuit stated in United States v. Sanders, 994 F.2d 200, 209 (5th
14 Cir. 1993): "Handcuffs are a temporary restraining device; they limit
15 but do not eliminate a person's ability to perform various acts. . . .
16 Handcuffs do limit a person's ability to use his hands and arms, but
17 the degree of the effectiveness of handcuffs in this role depends on a
18 variety of factors, including the handcuffed person's size, strength,
19 bone and joint structure, flexibility, and tolerance of pain. Albeit
20 difficult, it is by no means impossible for a handcuffed person to
21 obtain and use a weapon concealed on his person Finally, like
22 any mechanical device, handcuffs can and do fail on occasion."

23 Accordingly, under the totality of the circumstances,
24 Officer Solomon had the reasonable and articulable suspicion necessary

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1 to conduct the protective frisk of McCall. Therefore, the motion to
2 suppress the loaded pistol is denied.

3 Dated: April 27, 2006

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5 /s/ Garland E. Burrell, Jr.
6 GARLAND E. BURRELL, JR.
7 United States District Judge
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